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No. 82-1555

IN THE

Supreme Court of the United States

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G. individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

vs.

CONSOLIDATED RAIL CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Did the Federal Railroad Safety Act modify the preemptive effect of the Locomotive Inspection Act?

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INTEREST OF THE AMICUS CURIAE

The Pennsylvania State Legislative Board, United Transportation Union (State Board) files this brief in support of the Jurisdictional Statement filed by the Pennsylvania Public Utility Commission.

The Pennsylvania State Legislative Board is that arm of the United Transportation Union, itself an international labor organization representing railroad operating personnel, which is peculiarly responsible for the efficacy of Pennsylvania law in achieving the maximum degree of safety which can reasonably be provided by such state law for the members which it represents.

The State Board was instrumental in securing the enactment of legislation by Pennsylvania in 1972 requiring that railroads provide speed indicators and in 1975 of legislation requiring speed recorders. These Acts were codified by the Legislature as 66 Pa. C.S. § 2705 in 1978 as set forth in the Jurisdictional Statement, Appendix A, 1a.

The voluntary use of both of these devices by American railroads is certainly not abnormal. The State Board was pleased when the Federal Railroad Administration (FRA) adopted a regulation requiring speed indicators as it was nationwide in scope. The State Board still believed that speed recorders provided an important method of monitoring the speed of railroad trains. The speed restrictions imposed by rail management are imposed for good and sufficient reason and State Board believes that the observance of such regulations by employees operating the engines is essential to the enhancement of safety. The most effective way of checking speed and enforcing specific limitations is by the use of the speed recorder.

The State Board is not privy to the thinking of the FRA when it deemed speed recorders as experimental devices but it had been able to convince the Senate and House of Pennsylvania of their value in accident prevention. Compliance with the Pennsylvania law by railroads operating in Pennsylvania was complete except for Consolidated Rail Corporation (ConRail). ConRail chose instead to in-

stitute this action in a federal court seeking and obtaining a declaratory judgment. The effect of this judgment is to allow ConRail to operate engines in Pennsylvania without speed recorders even though many had been so equipped at one time. The State Board believes that the Commonwealth of Pennsylvania should be permitted to require speed recorders and that such was the intent of Congress when it passed the Federal Railroad Safety Act in 1970.

The State Board files this Amicus Curiae brief not only in support of the position taken by the Pennsylvania Public Utility Commission but also to urge that the answer to the second question posed by the Commission necessarily depends upon the correctness of the District Court's finding "that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total preemptive effect of the Locomotive Inspection Act," Jurisdictional Statement, 10a.

ARGUMENT

The Federal Railroad Safety Act modified the preemptive effect of the Locomotive Inspection Act.

Initially, it is noted that the Federal Railroad Safety Act's Section 205 (45 U.S.C. § 434) reproduced in the Jurisdictional Statement p. 6, which sets forth the new rules relative to preemption is clear and unambiguous. This being the case resort to legislative history to determine the intent of Congress not only is unnecessary but improper. *Rubin v. U.S.*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed2d 633 (1981); *Howe v. Smith*, 452 U.S. 473, 101 S.Ct. 2468, 69 L.Ed2d 171 (1981).

The State Board subscribes to this view but the lower Court found that the Federal Railroad Safety Act (FRSA) is in fact ambiguous as to its application to railroad safety

legislation existing at the time of its passage. Although the FRSA's statements as to the preemptive effect of federal regulation seem clear and unambiguous to many, State Board will resort to an analysis of legislative history as it has become apparent that others find the FRSA ambiguous.

ConRail argues that the FRSA of 1970, 45 U.S.C. 434, was intended to make no change in the preemptive effect of the Locomotive Inspection Act (LIA) 45 U.S.C. 23. In accepting such assertion the decision below quotes the House Report which does indeed state that the "committee chose to continue them [selected railroad safety laws including the L.I.A.] without change." (H.R. p. 4105)*

The State Board certainly does not contend that the LIA was repealed by the FRSA or that it does not provide the authority for further and new federal regulation of locomotive appurtenances as was indeed the case with regard speed indicators. State Board does contend that statements to the effect that prior safety acts would remain unchanged must be read in the context of the development of the final version of the FRSA.

At the time the FRSA was being formulated, the Administration, specifically Secretary of Transportation James M. Beggs, advocated that all the existing rail safety statutes be repealed and supplanted by regulations (S.R. p. 16). Rail labor opposed such repeal feeling that the regulations to be adopted by the Secretary would not be conducive to safety as the mandatory requirements of the existing acts.

Note: * References herein to H.R. refer to the Report of the Committee of the House of Representatives on S.1933 which became the FRSA. The Report is No. 91-1194 and is reprinted in 1970 U.S. Code Cong. and Adm. News 4104, 4108. Page references are to the reprint. Similarly, the Senate Report No. 91-619 is cited as S.R. Page references are to the original report.

That is why Senator Winston Prouty stated in introducing the FRSA (then S. 1933) that several obsolete safety laws were repealed but the LIA and others proposed for repeal by the Administration and by him (Senator Prouty) were left in. (Cong. Rec. Senate, December 19, 1969, p. 40204.)

In its successful effort to achieve a Bill with unanimous support, Congress yielded to the concern of the railroad unions that if the existing status were repealed and incorporated as regulations the statutory standards might be relaxed by the Secretary (Committee hearings, S. 1933, p. 369).

It was for the purpose of reassuring those members of Congress who supported the railroad unions' position that statements were made that acts such as the LIA would continue "unchanged" (Cong. Rec. House, August 7, 1970, p. 27613).

At the same time, however, it seems clear that Congress intended that the FRSA would be supreme in the sense that it would unify federal and state safety regulation. Representative Friedl of Maryland said in the limited debate:

> "It has, in my view, coordinated and combined all the previous safety statutes we have passed over the years." (Cong. Rec. House, August 6, 1970, p. 27615.)"

It is submitted that this is the conclusion to be drawn from the legislative history of the FRSA; namely, that it was intended to be the master federal act coordinating and combining in one regulatory and enforcement format all federal and state effort in the field of railroad safety.

The House Report states the primary purpose of the

FRSA to be the promotion of safety in all areas of railroad operations, to reduce railroad accidents, and to reduce deaths and injuries to persons (H.R. p. 4104).

It is simply not true that the primary purpose of the FRSA was uniform national regulations as indicated by the decision below. This was indeed a goal but the achievement of that goal was secondary to safety. There was a clear recognition of the vital part to be played by the states in the achievement of greater safety of rail operation.

One needs read only the Background and Need for Legislation in the House Report (H.R. p. 4105) to be convinced as to the purpose of the Act. All the emphasis is on safety – none on the need for uniformity.

The House Report gives the history of the role of the States in rail safety. It states that the Task Force recommended that the existing state requirements remain in effect until preempted by Federal Action and that the Department of Transportation followed this recommendation. It goes on to state that the Bill as passed by the Senate adopted these recommendations but it *also permitted the states to regulate in new areas* until preempted.

This important change by the Senate became a part of the final Act. It must be stressed that this approval was adopted in the original committee hearing held by the Senate Committee.

The Senate Report (91-619) also sets forth the purpose of the Bill as being the promotion of safety. This Report goes on to say "The Committee has also made the judgment that the Federal Government, in its effort to provide for greater safety on the Nation's railroads, should enlist the assistance of those states which have the capability and which are willing to join in the effort" (S.R. p. 1).

When the Bill passed by the Senate reached the House, Representative Madden, who introduced it, said:

> "States are authorized to regulate in any area of safety until the Secretary acts." (Cong. Rec. August 6, 1970 p. 27610).

On the same date, Representative Staggers in speaking for the Bill said:

> "As an important adjunct, *for the first time,* the States are clearly given the power to initiate legislation in areas which have not been touched by these [federal regulations] and these state legislative efforts will remain in effect unless and until such time that the federal government institutes its own regulations. *This is an important advance and recognition of state government."* (Cong. Rec. August 6, 1970 p. 27613)

There seems little doubt in the minds of the members of the House that the FRSA was intended to embrace the entire field of railroad safety.

Representative Friedl said:

> *"It has, in my view, coordinated and combined all previous safety statutes we have passed over the years."* (Cong. Rec. August 6, 1970, p. 27615).

No one expressed a contrary view and the Bill passed with a minor amendment, 358-0.

There is, we submit, absolutely no basis for any contention that Congress intended not to change the existing preemptive effect of the LIA for the sake of uniformity. Safety was the primary goal and the states were given an important role to play in regulating in new areas for the first time. One of the new areas was that of locomotive

equipment where state regulation was made possible for the first time.

The State of Washington took advantage of this Congressionally bestowed power and passed an Act requiring spark arrestors on all engines. This Act, the Washington Supreme Court held, was not preempted by the LIA because of the new standards of preemption made a part of the federal-state program for rail safety embraced within the FRSA. *State of Washington v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 79 Wash. 2d 288, 484 P.2d 1146, cert den. 404 U.S. 804, 92 S.Ct. 108, 30 L.Ed2d 36 (1971).

One of the most important of the cases decided after the enactment of Section 205 of the FRSA is *Bessemer & Lake Erie RR Co., et al. v. Pa. Public Util Com.,* 28 Pa. Cmwlth Ct. 461, 368 A.2d 1305 (1977) (hereinafter referred to as *Bessemer II*). Prior to *Bessemer II,* the Supreme Court of Pennsylvania on May 21, 1968, struck down the Public Utility Commission's Amended Rule 16 (requiring flag protection) on the sole issue of preemption by the Federal Block Signal Act, 49 U.S.C. § 26, in a 4-3 decision. *Bessemer & Lake Erie Railroad Company v. Pa. Public Util Com,* 430 Pa. 339, 243 A.2d 358 (1968) cert den. 393 U.S. 959, 895 S.Ct. 614 (1969) (hereinafter referred to as *Bessemer I*). The basis for the Court's finding of preemption in *Bessemer I* was its feeling that the Block Signal Act indicated an intent by Congress to regulate the entire area of train "spacing" both by fixed signals and flagging.

However, after the enactment of the FRSA and relying upon Section 205 thereof, the Commission reinstated Rule 16 in September of 1975. Several months later, the Pennsylvania Legislature passed a law which was substantially similar to Rule 16. Thereafter the railroads sought a

declaratory judgment in an effort to have this law declared invalid and unconstitutional on the basis of preemption under the Block Signal Act and *Bessemer I.* This action became *Bessemer II.*

The railroads' principle argument in *Bessemer II* was that *Bessemer I* still represented good law even after the enactment of the FRSA. The Commonwealth Court disagreed. The Court in *Bessemer II* held that while Act 142 and the Block Signal Act had the same purpose – the prevention of rear end collisions, the Block Signal Act did not "act to oust or displace Act 142." 368 A.2d 1305 at 1311. As the Court stated at page 1308:

> "At the time of the decision in Bessemer, the Supreme Court of Pennsylvania was writing upon a clean slate. Given no clear indication from Congress of their intent as to preemption (as later given in the FRSA), it very properly found the field to have been preempted, using as their authority the words of Justice Holmes, who stated:
>
> > 'When the United States has exercised its exclusive powers over interstate commerce as far as to take possession of the field, the States no more can supplement its requirements than they can annul them.' *Bessemer,* supra, 430 Pa. at 347, 243 A.2d at 362. (Citation omitted.)
>
> "Now, however, with the very clear manifestation of Congress' intent as to preemption in the FRSA, which specifically allows for state participation in the regulation of railroad safety, the preemption argument of the Pennsylvania Court in *Bessemer,* is no longer valid."

Just as the railroad in *Bessemer II* argued that the state law requiring flagging was unconstitutional on the basis of the Block Signal Act and *Bessemer I*, here ConRail argues that the Pennsylvania Act is unconstitutional on the basis of the Locomotive Inspection Act and *Napier v. Atlantic Coast Line RR*, 272 U.S. 605, 47 S.Ct. 297, 71 L.Ed 432 (1962). Therefore, just as the flagging act was allowed to stand until federal regulation covered the same subject matter, so too the Pennsylvania Act requiring speed recorders should be allowed to stand as the Locomotive Inspection Act and the Block Signal Act are on an equal footing vis a vis the FRSA.

Furthermore, absent actual conflict between state and federal regulations, the question of Congressional intent is no longer considered relevant in deciding questions of preemption.

In *Malone v. White Motor Corporation*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed2d 443 (1978), in resolving a question of preemption, it was held that the proper test was *not the intent to preempt* but rather the purpose of Congress in passing the legislation.

This was held to be the "ultimate touchstone." The purpose of Congress in passing the Federal Rail Safety Act was to enhance safety.

Napier was decided in 1926. Since that time many Supreme Court cases have discussed preemption. For example, the *Huron Portland Cement Co. v. City of Detroit, Mich.* 362 U.S. 440 at 443, 80 S.Ct. 813, 51 L.Ed2d 604 (1960) the following appears:

> "In determining whether state regulation has been preempted by federal action the intent to supersede the exercise by the state of its police

> power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, *such intent is not to be implied unless the act of Congress, fairly interpreted, is an actual conflict with* the law of the state."
> (citations omitted, emphasis added)

Accord, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977); *Buck v. California*, 343 U.S. 99, 72 S.Ct. 502, 96 L. Ed 775; reh. den. 343 U.S. 932, 72 S.Ct. 756, 96 L.Ed. 1341 (1952): *Bessemer & Lake Erie. Co. v. Pa. Pub. Util Com.*, II, supra.

There is no federal regulation regarding speed recorders which conflicts with the Act of Pennsylvania and hence there is no conflict in the instant case. The question of Congressional intent being irrelevant under the more recent cases in the absence of actual conflict there is no preemption.

The subject matter of the instant litigation is the placing of speed recorders on engines. There are no federal regulations covering the same subject matter which are in any way inconsistent. Actually, the federal requirement for a speed indicator is very compatible and makes the speed recorder requirement much less expensive and burdensome.

The exercise of federal supremacy is not lightly to be presumed. Nor is it to be presumed that a federal statute was intended to supersede the state's exercise of power unless there is a clear manifestation of intention to do so. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 94 S.Ct. 383 (1973); *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507

(1973); *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 93 S.Ct. 1854 (1973); *Evansville Airport v. Delta Airlines,* 405 U.S. 707, 92 S.Ct. 1349 (1972); cf. *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 94 S.Ct. 1879 (1974); *Fry v. United States,* 421 U.S. 542, 95 S.Ct. 1792 (1975).

These recent cases established that where Congress had not made clear its intention to preempt or where the conflict is only a potential one or peripheral to the purpose of the federal statute, state legislation will be allowed to stand.

The analysis of preemption issues depends primarily on statutory, non-constitutional interpretation.

In *Jones v. Rath Packing Co.,* supra, the path which must be followed to answer this question is outlined. The first inquiry is whether Congress, pursuant to its power to regulate commerce has so occupied the field as to exclude all state action, the inquiry then turns to whether the federal and state laws are in actual conflict. The intent to supersede the exercise by a state of its police power as to matters not covered by federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. Rather such intent is not to be implied unless the act of Congress is in actual conflict with the law of the state. This Court noted in *Rath* that an "actual conflict" occurs only when the state's law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." (*Rath,* 97 S.Ct. at p. 1310).

The requiring of speed recorders neither impairs nor makes impracticable national uniformity of "laws, rules, regulations, orders" or "standards" relating to railroad safety. The Pennsylvania Act provides only that locomotives be equipped with speed recorders. If a lack of

uniformity becomes a problem, the railroads can seek relief from the federal authorities.

SUMMARY OF ARGUMENT AND CONCLUSION

The right of states to promulgate and enforce regulations relative to railroad safety covering any subject not yet regulated by the federal government is preserved by the Federal Railroad Safety Act. It must be concluded that since the enactment of Section 205 of the FRSA, the rule of *Napier*, supra, is of no effect.

Under the new guidelines established by Section 205, states are free to regulate with respect to railway safety where no federal rule or regulation covers the same subject matter. Here the subject matter is speed recorders on locomotives. There is no federal rule or regulation covering this subject matter. Thus, a state law requiring speed recorders on locomotives is of full force and effect under Section 205 despite the *Napier* decision until the appropriate federal authorities regulate the same subject matter.

For the foregoing reasons, this Court should grant plenary review and, reversing the court below, find that Pennsylvania has not been preempted by the Locomotive Inspection Act from requiring speed recorders on locomotives travelling in excess of thirty miles per hour in Pennsylvania.

Respectfully submitted,

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